Hong Leong Nominees Sdn Bhd & Anor v Tommy Lim Boon Cheow & Anor (Lachaman Lalchand & Associates, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–452 OF 1996
KAMALANATHAN RATNAM J
25 AUGUST 1999

Civil Procedure *— Third party proceedings — Setting aside third party summons for directions — Whether special circumstances as to why third party directions may not be granted — Whether third party can claim indemnity from defendant — Civil Law Act 1956 s 10(1)(c)*

The first defendant had instructed his solicitors to write to the plaintiffs setting out his grievances against them. The solicitors wrote letters to the plaintiffs and extended copies of the letters to a few parties, among others Bank Negara, the Securities Commission and the police. The plaintiffs brought an action for defamation against the first defendant and their solicitors as second defendant. After the trial commenced, the plaintiffs and the second defendant reached a settlement and the action against the second defendant was withdawn. When the plaintiffs proceeded with the action against the first defendant, third party proceedings were taken against the second defendant. The third party/second defendant then applied to set aside the third party directions contending, among others that the first defendant had not made out a fit and proper case for the court to grant third party directions and that as the second defendant was acting in their capacity as agents on behalf of its principal, namely the first defendant, pursuant to s 10(1)(c) of the Civil Law Act 1956 ('the Act'), the second defendant should instead be indemnified by the first defendant.

Held, dismissing the third party's application:

(1) The first defendant in seeking third party directions had to show that there was a question proper to be tried as to the liability of the third party for a contribution or an indemnity claimed in the present action. If a prima facie case was made out, then the third party must show special circumstances why the directions should not be given.

On the facts, the solicitor-client relationship gave rise to relevant issues that needed to be tried and the publication of the letters by the second defendant formed the crux of the plaintiffs' suit. No further pleadings were necessary on the third party directions as the pleadings filed were adequate. The first defendant needed only to seek for an order for third party directions that the second defendant participated in the proceedings of the main suit, and at the conclusion of the main suit, if liability was found against the first defendant, then such liability and its extent of indemnity and contribution, if any,

against the third party will be determined as well. Further, the second defendant had not shown any special circumstances why the third party directions should not be given (see pp 103E–F, 104C, 105C–E).

(2) The third party's contention that their relationship with the first defendant of solicitor-client was an agent-principal affair called for the court to examine whether the third party was acting within the authorized acts of the first defendant in the trial of the main suit. As such, the later part of s 10(1)(c) of the Act, namely that, 'no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought', did not apply to the present set of facts (see pp 105F, I–106A).

[Bahasa Malaysia summary

Defendan pertama telah mengarahkan peguam beliau untuk menulis kepada plaintif-plaintif menerangkan aduan-aduan beliau terhadap mereka. Peguam-peguam tersebut telah menulis beberapa pucuk surat kepada plaintif-plaintif dan telah menyampaikan salinan surat-surat tersebut kepada beberapa pihak, antara lain, Bank Negara, Suruhanjaya Sekuriti dan pihak polis. Plaintif-plaintif telah memulakan tindakan kerana fitnah terhadap defendan pertama dan peguam beliau sebagai defendan kedua. Setelah perbicaraan dimulakan, plaintif-plaintif dan defendan kedua telah mencapai satu penyelesaian dan tindakan terhadap defendan kedua telah ditarik balik. Apabila plaintif-plaintif meneruskan tindakan terhadap defendan pertama, prosiding pihak ketiga telah diambil terhadap defendan kedua. Pihak ketiga/defendan kedua kemudiannya telah memohon untuk mengetepikan arahan pihak ketiga dengan menegaskan, antara lain, bahawa defendan pertama tidak memulakan satu kes yang sesuai dan betul bagi mahkamah memberikan arahan pihak ketiga itu dan bahawa memandangkan defendan kedua telah bertindak di dalam kapasiti mereka sebagai seorang ejen kepada prinsipalnya, khususnya defendan pertama, menurut s 10(1)(c) Akta Undang-Undang Sivil 1956 ('Akta tersebut'), defendan kedua hendaklah sebaliknya dibayar ganti rugi oleh defendan pertama.

Diputuskan, menolak permohonan pihak ketiga:

(1) Defendan pertama di dalam memohon arahan pihak ketiga terpaksa menunjukkan bahawa wujud satu persoalan yang wajar untuk dibicarakan tentang liabiliti pihak ketiga terhadap suatu sumbangan atau suatu ganti rugi yang dituntut di dalam tindakan ini. Sekiranya wujud satu kes prima facie, maka pihak ketiga perlu menunjukkan keadaan-keadaan tertentu kenapa arahan itu tidak sepatutnya diberikan.

Berdasarkan kepada fakta-fakta, hubungan peguamcara-anakguam telah menimbulkan isu-isu berkaitan yang perlu

dibicarakan dan penerbitan surat-surat oleh defendan kedua itu membentuk pokok persoalan tindakan plaintif-plaintif. Tiada pliding lanjutan yang perlu terhadap arahan pihak ketiga itu kerana pliding yang telah difailkan itu mencukupi. Defendan pertama hanya perlu memohon satu perintah untuk arahan pihak ketiga bahawa defendan kedua telah turut serta di dalam prosiding tindakan guaman utama itu, dan pada kesimpulan tindakan utama itu, sekiranya wujud liabiliti terhadap defendan pertama, maka liabiliti tersebut dan sejauhmana ganti rugi dan sumbangan itu, jika ada, terhadap pihak ketiga akan ditentukan juga. Tambahan pula, defendan kedua tidak menunjukkan apa-apa keadaan-keadaan tertentu mengapa arahan pihak ketiga itu tidak patut diberikan (lihat ms 103E–F, 104C, 105C–E).

(2) Penegasan pihak ketiga bahawa hubungan mereka dengan defendan pertama sebagai peguamcara-anakguam merupakan satu hubungan ejen-prinsipal yang memerlukan mahkamah meneliti sama ada pihak ketiga bertindak di dalam tindakan yang dibenarkan oleh defendan pertama di dalam perbicaraan tindakan guaman utama tersebut. Oleh demikian, bahagian akhir s 10(1)(c) Akta tersebut, khususnya, 'tiada sesiapa yang berhak untuk menuntut sumbangan di bawah seksyen ini daripada sesiapa yang berhak untuk dibayar ganti rugi olehnya berhubung dengan liabiliti tentang sumbangan yang dipohon', adalah tidak terpakai di dalam set fakta-fakta ini (lihat ms 105F, I–106A).]

Notes

For cases on third party proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4810–4822.

Cases referred to

Baxter v France & Ors (No 2) [1895] 1 QB 591 (refd)
Courtenay-Evans & Anor v Stuart Passey & Associates (a firm) & Anor [1986] 1 All ER 932 (refd)
Dato' Wong Gek Meng v Pathmanathan a/l Mylvaganam & Ors [1998] 5 MLJ 560 (refd)
Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties) [1993] 1 SLR 723 (refd)
Pontifex v Foord (1884) 12 QB 152 (refd)

Legislation referred to

Civil Law Act 1956 s 10(1)(c)
Rules of the High Court 1980 O 16 rr 1(a), 4(3), 4(4)

D Mahalingam (*Tay Tee & Nasir*) for the plaintiffs.
Eric Clement (*Siva Thurai Mariany & Co*) for the first defendant.
Logan Sabapathy (*Mohd Izral Khairy* with him) (*Logan Sabapathy & Co*) for the third party.

Cur Adv Vult

Kamalanathan Ratnam J:

Preamble

This case has a long and chequered history. The suit number as stated above is misleading. It is not correct to assume that this suit was filed in 1996. In fact this suit was initially filed in the commercial division under case No D3–22–518–93. It was filed on 21 May 1993. On 23 November 1996, it was transferred to the civil division under the present suit number.

The main action

The plaintiffs ('the Hong Leong Group') had in May 1993 brought a claim against the first defendant ('the client') and the second defendant ('the solicitors' firm'). The claim is for alleged defamation arising out of two letters described as letter A and letter B written by the solicitors' firm on behalf of the client. In his defence to the claim by the Hong Leong Group, the client had set out the relevant facts and circumstances of his grievance and contends that there was a breach by the Hong Leong Group of the voluntary general offer. However, the client had sought in his defence to state that he had obtained the professional advice and assistance of the solicitors' firm and that the choice of language in letter A and letter B is entirely that of the solicitors' firm, and in para 18 of the said defence, he had stated that he would seek a contribution and/or indemnity from the solicitors' firm. It is clear that at all material times, the solicitors' firm was acting for the client and had raised the defence of, inter alia, qualified privilege with no malice as against the Hong Leong Group.

On 26 January 1999, the trial commenced against the client and the solicitors' firm. The plaintiffs produced their first witness whom the solicitors' firm (the present third party) cross-examined at length. At the next date fixed for continued hearing, that is on 24 March 1999, the plaintiffs and the solicitors' firm informed the court that a settlement had been reached between them. Upon terms not recorded in court nor notified to the court, the matter between the plaintiffs and the solicitors' firm was resolved in that the action against the solicitors' firm was withdrawn with the action against the client to continue thereafter without the presence of the solicitors' firm. The client's solicitors then requested for an adjournment to take further instructions. On the next date fixed for continued hearing, that is on 9 April 1999, the client's solicitors informed the court that the client intended to apply to issue out a third party notice against the solicitors' firm. I then adjourned proceedings to enable the client to do so. The client then applied for leave to issue out the third party notice and obtained the said order on 10 May 1999. Following service of the said third party notice, the client has now issued the summons for third party directions seeking inter alia the delivery of pleadings as between himself and the solicitors' firm to be delivered with a view to the solicitors' firm's liability being determined in the continued action between the plaintiffs and the client.

The application

The third party now opposes this application for third party directions on various grounds.

Findings of the court

Upon an application for third party directions, the court acts within the confines of O 16 r 4(3) and r 4(4) of the Rules of the High Court 1980 ('the RHC') which read as follows:

> (3) On an application for directions under this rule the court may —
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> (a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant; or
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> (b) order any claim, question or issue stated in the third party notice to be tried in such manner as the court may direct; or
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> (c) dismiss the application and terminate the proceedings on the third party notice;
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> and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant.
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> (4) On an application for directions under this rule, the court may give the third party leave to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just, and generally may make such orders and give such directions as appear to the court proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action.

In my view, nothing rests upon the fact that leave was granted for the issuance of the third party notice. All that arises at the leave stage is the question of a prima facie case being made out for allowing the defendant to issue the said notice. In *Pontifex v Foord* (1884) 12 QB 152, Pollock B said at p 156:

> ... It seems to me that this is no case of contribution or indemnity, and therefore that the learned judge was right in refusing to give directions, and that this appeal must be dismissed. In coming to this conclusion, I do not think we are in any way overruling the decision of the Divisional Court which gave leave to serve the third party notice. It may be that there was a prime facie case made out for allowing the defendant to serve the notice, but when it comes to be a question of directions, we must then be satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed.

In its normal course, the matter comes up for review at the third party directions stage and it is at this stage, if no directions are given upon the application being refused, the said third party notice becomes a nullity (see *Courtenay-Evans & Anor v Stuart Passey & Associates (a firm) & Anor* [1986] 1 All ER 932 at p 934).

A Having analysed the law relating to the issuance of third party directions it is my judgment that the court may refuse to give directions and will dismiss the defendant's summons for third party directions under the following circumstances:

(a) If the claim sought to be made by the defendant against the intended B third party is outside the scope of O 16 r 1 of the RHC. In the context of O 16 r 1(a) dealing with contribution or indemnity, the question is whether the defendant has satisfied the court that there is a question proper to be tried as to the liability of the intended third party to make a contribution and indemnity claim, in whole or in part.

C (b) Irrespective of whether such a claim by the defendant against the intended third party arguably falls within the scope of the said O 16 r 1 and notwithstanding considerations of avoiding multiplicity of proceedings, the question is whether there are special circumstances which, as a matter of properly exercised discretion, make it unsuitable for directions to be issued against the third party. In this respect, the D following are to be noted:

(i) That the question whether there is a right to indemnity is far more difficult and complicated than any questions in the action (see *Baxter v France & Ors (No 2)* [1895] 1 QB 591).

(ii) That a portion of the dispute arising out of the transaction is E such that it ought not to be tried in the same action but must form the subject matter of another action. In this respect, there is the concept of an independent claim for damages which is considered by the court in the context of the present action as compared to that intended in the third party action (see *Baxter v France & Ors (No 2)* [1895] 1 QB 591 at pp 593, 594).

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(iii) Considerations of delay in the context of the speedy determination of the plaintiff's own case and miscellaneous matters relating to the time at which the defendant sought to put into place third party proceedings (see *Courtenay-Evans & Anor v Stuart Passey & Associates (a firm) & Anor* [1986] 1 All ER 932 G at p 934).

The third party argued that the client has not made out a fit and proper case for this court to grant third party directions against the solicitors' firm and that the third party notice should be terminated. The third party further argued that the claim, if any, that the client has against the solicitors' firm H is for breach of duties owing by the solicitors' firm to the client whether in contract or in tort or both. This claim is an independent claim which sounds in damages which may result in damages equating to an indemnity but does not sound at the onset in an indemnity of the conventional type known to arise. The third party further contended that the said claim involves, in part, disputes which are wholly not attributable or connected with the disputes I that arise in the action commenced by the Hong Leong Group against the client. On the part of the Hong Leong Group, the question that arises is one of defamation arising from letter A and letter B issued by the solicitors' firm

for and on behalf of its principal, namely, the client. The action intended by the client against the solicitors' firm would involve questions whether or not there was a breach of duties by the solicitors' firm in the context of letter A and letter B.

It is the third party's case that the client's issuance of the third party notice ought to have arisen much earlier. The client ought to have protected himself against the eventuality of the discontinuance arising but instead chose to defend the action without putting into place recourse against the solicitors' firm. From the perspective of diligence in the conduct of its defence, the client has failed and therefore should not be allowed at this late stage to re-invite the solicitors' firm to participate in the present action commenced by the Hong Leong Group.

The third party also argued that there can never be an indemnity from the solicitors' firm to the client but instead, it should be the other way round and relied on the case of *Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties)* [1993] 1 SLR 723. Finally, the third party relied on s 10(1)(c) of the Civil Law Act 1956 which reads as follows:

> Proceedings against, and contribution between, joint and several tortfeasors
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> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

The third party thus argued that this section recognizes that contribution by the client from the solicitors' firm in the context of joint tortfeasors does not arise if the contribution is being sought from a party who already has a right of indemnity against the party seeking the contribution.

Having considered the arguments of the third party it is imperative that this court warns itself that what the third party is attempting to do is to summarily terminate the client's third party proceedings from inception. This no doubt is a serious step; yet there are no affidavits filed in opposition. I am therefore constrained to look into the pleadings and the evidence so far adduced to assess the propriety of the third party proceedings instituted by the client.

It is the client's case that the words contained in letters A and B were written by the solicitors' firm and that he instructed the solicitors' firm (third party) in respect of his grievances, relating to the receipt and the plaintiffs' handling of his cheque and the client thereafter left it to the professional expertise, skill, care and knowledge of the solicitors' firm (third party) to convey his grievances to the plaintiffs. The client also contends that being a lay person he relied entirely on the solicitors' firm (third party) to use its professional skill, care and professional expertise, in writing letters

A and B. The client denied instructing the solicitors' firm to extend copies of letter B to Bank Negara, Zalik Securities Sdn Bhd, Kuala Lumpur Stock Exchange, the Registrar of Companies and Commercial Crimes Division of the Police Department. The client further states that letter A and letter B were extended to the various parties by the solicitors' firm for reasons best known to them.

The client argued that he reserves his right to seek contribution and/or indemnity from the solicitors' firm (third party) in the event he is found liable as the solicitors' firm (third party) should be held responsible for not exercising sufficient care, skill, diligence and professional expertise in writing the relevant letters and thereby rendering the first defendant open to this suit.

The solicitors' firm (third party) in its defence contended that both the letters were written on the instructions of the client under a sense of duty and without malice towards the plaintiffs. On the belief that the statements were true, the solicitors' firm published the letters to the various parties. The solicitors' firm (third party) contended that the publication of letter B to the various parties was made by them as the various parties had a common and corresponding interest in the subject matter and that the solicitors' firm was under a social and/or moral and/or legal duty to publish the said words to the various parties.

In their reply to the solicitors' firm's defence, the plaintiffs contend that the publication of the words in letters A and B was recklessly and maliciously done by the solicitors' firm.

It is my judgment that the client has to show that there is a question proper to be tried as to the liability of the solicitors' firm (third party) for a contribution or an indemnity claimed in the present action. It is also clear that if a prima facie case is made out then the solicitors' firm must show special circumstances why the directions should not be given.

Is there a question proper to be tried?

In establishing the fact that there is a question proper to be tried as to the liability of the solicitors' firm in this case the following main factors should be considered.

The relationship of the solicitors' firm and the client

A solicitor-client relationship is two-fold:

(1) As stated by Abdul Malik Ishak J in *Dato' Wong Gek Meng v Pathmanathan a/l Mylvaganam & Ors* [1998] 5 MLJ 560 at p 568:

> '... The obligations of Mr Mahalingam towards his client, the plaintiff, must be viewed at two angles. Firstly, at equity. Secondly, at common law. In equity, the relationship between a solicitor and his client is entirely fiduciary (*Owen v Ord* (1828) 3 C & P 349; *Wiggins v Peppin* (1839) 2 Beav 403; *Bird v Harris* (1881) WN 5 (CA)) and it carries with it the obligations on the solicitor's part to act not only with strict fairness but also with an attitude of openness. Failure to adhere to this onerous obligation renders the solicitor

liable to make compensation for any loss incurred by his client (*Nocton v Lord Ashburton* [1914] AC 932 (HL); *Re Burford, Burford v Clifford* [1932] 2 Ch 122 (CA)). On the other hand, at common law a solicitor by his retainer must be skilful and careful. Mr Mahalingam must put at the plaintiff's disposal not only his skill but also his knowledge of the law as far as is relevant and germane (*Spector v Ageda* [1973] 1 Ch 30; [1971] 3 All ER 417). In the context of the present case, Mr Mahalingam's lackadaisical attitude in filing encls 46, 49 and 21 without complying with Form 114 opened him, in law, to liability in tort for negligence (*Midland Bank Trust Co Ltd & Anor v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384; [1978] 3 All ER 571).'

I accept the principle set out by my learned brother as the correct proposition of the two pronged views. It is clear to my mind that the client has raised relevant issues that need to be tried. Letter A was published by the solicitors' firm based on the records and on the interpretation of the records solely at the disposal of the solicitors' firm. The publication of letter B by the solicitors' firm to Bank Negara, the Securities Commission, the police and to Zalik Securities, were done on the exercise of discretion by the solicitors' firm as they felt that all those parties had a common and corresponding interest in the subject matter. Further they also considered that they had a social, moral and legal duty to publish the said words to those said parties. The legal conclusions of the offences and civil liabilities drawn from the facts related to by the client as described in letters A and B respectively are of:

(i) misappropriation;

(ii) conversion and/or;

(iii) any unauthorized collection or release of the cheque; and

(iv) assisting or abetting of such an act.

These conclusions drawn and made by the solicitors' firm are based on their skill and legal knowledge. I also note from the testimony of the first plaintiff's first witness, that the grievance of the first plaintiff was as regards the said legal conclusions drawn and published. I am thus fully satisfied that the client has shown that there is a question proper that ought to be tried in this action.

Should the client sue his lawyers in a separate action?

The cause of action in the main suit is founded upon libel resulting from the publication of the letters A and B and the contents contained therein. The cause of action by the client as against the solicitors' firm is based on the negligence of the solicitors' firm in drawing the said legal conclusions and in publishing them to the various parties. I find as a fact that the causes of action as contained in the main suit and in the third party notice are based on the same facts and that the remedies for both are in damages. Further, it is my judgment that both the causes of action are so interwoven that they make up the fabric. This is because the facts and issues involved are identical and the witnesses are the same.

The practical considerations of a third party notice

The practical considerations that must be considered in allowing the third party notice, are as follows:

(i) The same witnesses will be called.

(ii) The same issues will be ventilated.

(iii) The conduct of the trial of the main suit has not proceeded any further and/or new steps taken from the last hearing.

It is obvious therefore that inviting the solicitors' firm to participate in the proceedings will not prejudice their rights. It will in effect avoid multiplicity of proceedings which will be both cost and time saving for both client and the solicitors' firm which is the intent of third party proceedings under O 16 r 1 of the RHC.

I also consider the fact that no further pleadings would be necessary on the third party directions as the pleadings already filed would be adequate. The client need only to seek an order, at the third party directions that the solicitors' firm participate in the proceedings of the main suit and on the conclusion of the main suit if liability is found against the client then such liability and its extent of indemnity and contribution, if any, as against the solicitors' firm (third party) be determined as well. Further I find that the solicitors' firm had shown no special circumstances why the third party directions should not be given.

Section 10(1)(c) of the Civil Law Act 1956

The solicitors' firm has raised the issue that it enjoys a right of indemnity against claims for acts done in pursuance of client's instructions and thus cannot be held liable under s 10(1)(c) of the Civil Law Act 1956. The basis of the above contention rests upon the notion that the relationship of a solicitor with his client is an agent-principal affair. If this contention is true then it calls for this court to examine whether the solicitor as agent was acting within the authorized acts of the principal. Therefore it is obvious that such an examination cannot be properly conducted in this summary application especially in the absence of third party pleadings and/or affidavit evidence.

In any event if the said legal conclusions drawn by the solicitors' firm in both the letters are found to be without merit and legally unfounded on the facts, the solicitors' firm would have acted outside and/or against the authority vested in them by the principal (the client) in having his interest and rights safeguarded. The same applies to the publication of both the letters which were done as the solicitors' firm deemed fit, and if it is found to be wrong and unjustified, the solicitors' firm had acted against the authority vested in them. Therefore, both these questions can only be determined during and at the conclusion of the trial of the main suit. It is my judgment therefore that the later part of s 10(1)(c) of the Civil Law Act, namely, that, 'no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the

liability in respect of which the contribution is sought', does not apply to the present set of facts. A

In the circumstances, this application to summarily abort the third party directions is dismissed with costs.

Third party's application dismissed.

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Reported by Chin En Tek

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